STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

DALE L. DUVERNEY,MARY J. DUVERNEY,
LINDA MARIE SMITH, CAMMIE PENNINGTON,
CHARLOTTE F. AVERY, LYLE RICHARD ELLIS,
DOROTHY E. OWEN, DALE E. NEFF,
TONI OWEN ANDERSON, ELMER M. SHEPHARD,
CRAIG ROBIN CRANDELL, KAREN SUE SMITH,
ELIZABETH JEAN SEATON, SHARON BARNETT,
JAY P. BARNETT, CLETIS J. BISHOP,
WALTER H. BRUSCH, JR., GENE RAYMOND HOY,
JODY MANUEL SHEPHARD, SARAH Y. WATSON,
EDWIN A. BROWN, JILL ANN LANEY,
GLENN MCDANIEL, ROGER ALLAN OTT II,
ETTA NASH, HAROLD SPROWL and CORA GORDAN,
individual Michigan taxpayers and property owners
subject to the jurisdiction of BIG CREEK-MENTOR
UTILITY AUTHORITY,and TOWNSHIP OF MENTOR,
MICHIGAN, and TOWNSHIP OF BIG CREEK, MICHIGAN
Plaintiff-Appellants

123163
Supl

vs.

Supreme Court Case Number: 123163
Court of Appeals Case Number 230866

BIG CREEK-MENTOR UTILITY AUTHORITY, a Michigan
Municipal Corporation, and TOWNSHIP OF MENTOR,
MICHIGAN, and TOWNSHIP OF BIG CREEK, MICHIGAN,
Jointly and Severally,
Defendant-Appellants

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PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

STATE OF MICHIGAN

IN THE SUPREME COURT

DALE L. DUVERNEY, MARY J. DUVERNEY, LINDA MARIE SMITH, CAMMIE PENNINGTON, CHARLOTTE F. AVERY, LYLE RICHARD ELLIS, DOROTHY E. OWEN, DALE E. NEFF, TONI OWEN ANDERSON, ELMER M. SHEPHARD, CRAIG ROBIN CRANDELL, KAREN SUE SMITH, ELIZABETH JEAN SEATON, SHARON BARNETT, JAY P. BARNETT, CLETIS J. BISHOP, WALTER H. BRUSCH, JR., GENE RAYMOND HOY, JODY MANUEL SHEPHARD, SARAH Y. WATSON, EDWIN A. BROWN, JILL ANN LANEY, GLENN MCDANIEL, ROGER ALLAN OTT II, ETTA NASH, HAROLD SPROWL and CORA GORDAN, individual Michigan taxpayers and property owners subject to the jurisdiction of BIG CREEK-MENTOR UTILITY AUTHORITY, and TOWNSHIP OF MENTOR, MICHIGAN, and TOWNSHIP OF BIG CREEK, MICHIGAN

Plaintiffs - Appellants

vs.

Supreme Court Case Number:
Court of Appeals Case Number 243866

BIG CREEK-MENTOR UTILITY AUTHORITY, a Michigan Municipal Corporation, and TOWNSHIP OF MENTOR, MICHIGAN, and TOWNSHIP OF BIG CREEK, MICHIGAN, Jointly and Severally,

Defendants - Appellees

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NOTICE OF HEARING

All parties take notice that the Plaintiff-Appellant's Application for Leave to Appeal to the Supreme Court will be submitted to the Supreme Court for consideration on Tuesday, March 4, 2003, as soon thereafter as the matter may be heard.

Dated: January 29, 2003.

SCHMID & SCHMID PLLC
Attorneys for Plaintiffs

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GREGORY C. SCHMID, P37964

BY: _____
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SUPPLEMENTAL QUESTIONS INVOLVED

This Supplemental Brief in Support of Plaintiff-Appellant's application for leave to appeal the Court of Appeals order, which dismissed plaintiff's original action in the Court of Appeals on January 10, 2003, is provided pursuant to this Honorable Court's order dated December 30, 2003. The application for leave to appeal has not been granted, and remains pending at this time. The Court has ordered that the Clerk schedule oral argument on whether to grant the application or take other action permitted by MCR 7.302(G) (1). Accordingly, the Court granted leave to file supplemental briefs to discuss pleading requirements for an action claiming relief pursuant to the Headlee Amendment, Const 1963, art 9, § 31, as construed by ***Bolt v City of Lansing***, 459 Mich152 (1998), and whether those requirements have been met in this action.

ARGUMENT

The Court of Appeals' decision of January 10, 2003, is clearly erroneous and will cause material injustice to the taxpayers subject to the burden of Defendants' actions. The effect of the Court's ruling is to prevent the property owners subject to mandatory connection charges to exercise their right to vote thereon, despite the provisions of Michigan Constitution 1963 art 9, Sec §32, commonly referred to as the "Headlee" Amendment, and the Supreme Court decision in ***Bolt v City of Lansing***, 459 Mich 452 (1998). In its order, the Court of Appeals dismissed out of hand the taxpayers original action brought in the Court of Appeals. This was done without any opportunity for discovery and fact finding hearing contemplated by the law in these actions, and without any opportunity to correct any possible perceived defects in the pleadings and papers filed in the case.

First, the Michigan Legislature has implemented Article 9, § 32 of the State Constitution of 1963, as amended, by enacting the provisions of MCL 600.308(a), which specifically gives the plaintiff taxpayers the right to commence this type of case as an "original action" in the Michigan Court of Appeals.

Next, the Michigan Court Rules provide the method for bringing an original action in the Court of Appeals at MCR 6.206, which provides in general, at MCR 6.206(a), that "Except as otherwise provided in this rule, the general rules of pleading apply as nearly as practicable.", and which specifically sets the procedure for "Original Actions" as follows,

MCR 6.206 (D) Actions for Extraordinary Writs and Original Actions.

(1) Filing of Complaint. To commence an original action, the plaintiff shall

file with the clerk:

(a) 5 copies of a complaint (one signed), which may have copies of supportingdocuments or affidavits attached to each copy;

(b) 5 copies of a supporting brief (one signed) conforming to MCR 7.212(C) to the extent possible; .

Plaintiffs prepared a complaint with supporting brief and supporting documents, all of which are a unified pleading under the court rule and taken together as the Original Action filed by plaintiff, and subject to the general rules of pleading. There are many substantive requirements for a complaint. MCR 2.111(B) enumerates two of them that are applicable regardless of the subject matter. A complaint must contain:

(1) A statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend; and

(2) A demand for judgment for the relief that the pleader seeks.

The sufficiency of pleading has fairly been interpreted in ***Goins v Ford Motor Co,*** 131 Mich App 185; 439 NW2d 184 (1989) at page 195;

'A complaint need only contain "such specific averments as are necessary reasonably to inform the adverse party of the nature of the cause he is called upon to defend". GCR 1963, 111.1(1). A complaint is sufficient if it gives notice of the nature of the claim sufficient to allow the opposing party to take a responsive position. Simonson v. Michigan Life Ins. Co., 37 Mich.App. 79, 83, 194 N.W.2d 446 (1971). We agree with the

> trial court that plaintiff's complaint sufficiently apprised defendant that his action was brought because defendant discharged plaintiff for making use of the Bureau of Workers' Disability Compensation. Pleadings are not expected to narrow issues; rather, the discovery process, pretrial conference, and summary judgment serve this function. Simonson, supra. Moreover, issues not raised in a pleading may be tried by implied consent and then treated as if they had been raised in the pleadings. GCR 1963, 118.3; Christy v. Prestige Builders, Inc., 94 Mich.App. 784, 791-792, 290 N.W.2d 395 (1980), rev'd on other grounds, 415 Mich. 684, 329 N.W.2d 748 (1982).'

The purpose of MCR 2.111 is explained in ***Smith v Stolberg***, 231 Mich.App. 256, 586 N.W.2d 103, Mich.App(1998), which stated, "The purpose of the rule is to "avoid two opposite, but equivalent, evils ... the straightjacket of ancient forms of action ... [and] ambiguous and uninformative pleading." Dacon, supra at 329, 490 N.W.2d 369. Extreme formalism leads to dismissal of "potentially meritorious claims" and extreme ambiguity "undermines a defendant's opportunity to present a defense."

Plaintiff's complaint did in fact give notice of the nature of the claim sufficient to allow the opposing party to take a responsive position. Beyond the exhaustive allegations as to the jurisdiction, venue, plaintiffs, the defendants in their representative capacities, and the references to the two prior cases previously decided in the Court of Appeals regarding this sewer project, the complaint also set out in detail the nature of this new claim made under the Headlee Amendment, Const 1963, art 9, § 31, as construed by ***Bolt v City of Lansing***, 459 Mich152 (1998). First, the complaint detailed the lack of a vote, and the progression of actions taken over time that made connection to, and payment for, the sewer system involuntary. These included the ordinances passed, the threats of prosecution, and the levy of charges against real property on the tax rolls. The mandatory connection and payment of fees is the third of three basic factors

considered in a claim under ***Bolt***, and these three factors are weighed, more or less, without anyof them being critically dominant or dispositive in distinguishing a tax from a legitimate user fee.

Lack of voluntariness having been clearly alleged, the first two factors under ***Bolt***, were alleged in the complaint also. ***Bolt v City of Lansing***, 459 Mich152 (1998), at pages 161 and 162, states, "The first criterion is that a user fee must serve a regulatory purpose than a revenue raising purpose.", and, "A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service.". The court further determined that the water charges in Lansing where designed to defray capital expenditures, and said, "This constitutes an investment in infrastructure as opposed to a fee designed simply to defray the costs of a regulatory activity. Consequently, the ordinance fails both the first and second criteria.." ***Bolt***, at page 163.

In the case presently at bar, plaintiffs' complaint, at paragraph 11, clearly alleges the nature and amount of mandatory connection fees being imposed, in addition to service fees, and that these fees include debt service and capitalization charges imposed in addition to continuing service charges. Defendants answer did not deny this allegation relating to the revenue raising purpose of the mandatory charges.

"A true "fee", however, is not designed to confer benefits on the general public, but rather to benefit the particular person on whom it is imposed.", ***Bolt v City of Lansing***, 459 Mich152 (1998), at page 165. Plaintiff, in the case now before the court, alleged at paragraph 10 of plaintiffs' complaint that the offending ordinance mandates that all parcels within 200 feet connect to the sewer, without exception or consideration of the viability of the drain fields presently serving those parcels (drain field viability was further alleged at paragraph 15).

Defendants not only admitted the allegation but answered the requirement was, "legislatively determined to be for the protection of public health, safety, and welfare." At paragraph 19 of the complaint, plaintiff alleged the "public benefits far in excess of any particular benefit to the individual property owner." Finally, in their answer to plaintiffs paragraph 20, the defendants "...affirmatively state the public health, welfare, and safety are at risk due to Plaintiff's and others' failure too connect to the sanitary sewer system."

If the standard for sufficiency of the minimum pleading requirements under ***Bolt*** is that the pleadings in the original action include "such specific averments as are necessary reasonably to inform the adverse party of the nature of the cause he is called upon to defend.", then the analysis of sufficiency should include the answers and responses made to those allegations. The allegations made by plaintiffs are well known by defendants, who have in their possession all the documentation and chronological details as to the environmental justifications used to attract the grant and loan money obtained, and how they made their original ill-conceived original plan to pay the loan back though voluntary connections to the sewer system. The defendants' own answer to plaintiffs complaint shows they understand the facts that plaintiffs intend to prove and the nature of the cause he is called upon to defend. Defendants' made no request for a more definite statement, nor any motion to correct or strike pleadings, despite the opportunity presumably afforded to them by MCR 2.115 .

In dismissing the original action in the Court of Appeals, the Court Order which is the subject of this Appeal found plaintiff's pleadings "...wholly insufficient to persuade this court that the challenged charges constitute a tax". In an original action in the Court of Appeals, if

there are disputed facts, and the court sees fit to proceed to formal hearing, then plaintiffs can offer proof of allegations and the Court can develop a factual record by referral to a Circuit Court and/or decide the case after a full hearing on the merits. Otherwise, the court may deny relief according to MCR 7.206(3), below:

> "MCR 7.206(3) *Preliminary Hearing.* There is no oral argument on preliminary hearing of a complaint. The court may deny relief, grant peremptory relief, or allow the parties to proceed to full hearing on the merits in the same manner as an appeal of right either with or without referral to a judicial circuit or tribunal or agency for the taking of proofs and report of factual findings."

The difficulty in this present matter is the result of a Court of Appeals order that dismissed this case in its infancy, before detailed facts could be flushed out though the discovery process which quite commonly results in amendment of pleadings up to and sometimes during trial. If the Court of Appeals order had been less final, and if the order had provided the parties some breathing room with respect to amendment of pleadings, then this case could have proceeded on the merits after amendment was made to cure whatever defects the court may or may not have observed. If the Court of Appeals were really as concerned with the form of pleading as with the ***Bolt*** approach to Headlee enforcement actions in general, then the general rules of pleading would have indicated that plaintiff should have been given an opportunity to amend Plaintiffs' complaint under MCR 2.118 (A)(2), which states that, "Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." Amendment of the

plaintiff's complaint was allowed in ***Durant v Dept. Of Education***, 213 Mich.App. 500, 541 N.W.2d 278(1995), "Ten plaintiff school districts may amend their complaint to join Schmidt as plaintiffs. Amendment of the complaint would not result in futility, undue delay, or prejudice to the nonmoving party."The legitimacy of amending the complaint as a matter of course in an "original action" under Headlee was referred to the Court of Appeals, when that court limited the retroactivity of the Supreme Court ruling in **Bolt**, in the last remand of ***Bolt v City of Lansing***, 238 Mich.App. 37, 604 N.W.2d 745, (1999) "When plaintiff filed this Headlee suit on March 4, 1996, he did not seek monetary relief or ask this Court to order a refund of all taxes already paid by other taxpayers. Nor did plaintiff ask to represent other parties. After plaintiff lost his suit in this Court, and while appealing his case to the Michigan Supreme Court, he did not seek to amend his complaint to request damages or to represent others. Only after plaintiff prevailed in the Supreme Court, on December 28, 1998, did he first ask for damages on behalf of other taxpayers.

The ***Bolt*** case, boldly decided in the Supreme Court, embodies the spirit of tax limitation, even against the pressures of courts, municipalities, and the legislature to allow government expansionism. It forbids the practice to raising revenue in the name of user fees, and forces municipalities to seek voter approval of those who would be taxed when exacting new money from people. The Big Creek-Mentor Public Water and Sewer Ordinance is precisely the sort of government coercion that Tax Limitation intended to stop.

It bears repeating that the essence of tax limitation, and indeed of limited government, is consent. By limiting local governments to the taxes that they were authorized to levy at the time

of ratification in 1978 of the successful Headlee Tax Limitation Amendment, a Ballot Initiative Amendment to the Michigan Constitution, the people secured for themselves the absolute right to be free from new municipal expansionism not directly or indirectly consented to. This consent can be indirect by plebiscite, the general consent of the taxpayers being determined by majority vote. Under Headlee, only voter consent in a democratic election can give the government the awesome power to compel a person to pay new taxes for the general expansion of government. Direct consent can also be established by the voluntary use and enjoyment of special municipal services by a person who agrees to pay a legitimate "user fee" for that special benefit not otherwise conferred on the rest of the public. If a person wants to support expansion of a municipal enterprise which is not part of the general tax base, and will assume the financial responsibility for that enterprise, then they may freely consent to payment for a promised special benefit and thereafter be held to task for bargained for obligations. Unless a person has the right to refuse to participate in accept some municipal benefit, they cannot be compelled to pay any new involuntary obligation for it unless that compulsion to pay be by the manifest will of the majority of the people in a direct democratic election.

RELIEF SOUGHT BY PLAINTIFFS

Plaintiffs - Appellants respectfully seek such relief as it considers just and equitable under the circumstances, including but not limited to the following:

1. Grant this Application for Leave to Appeal

2. Upon Leave granted, that this Court reverse the Court of Appeals Order on the grounds that the offending connection charges constitute a tax, not a user fee.

3. Upon Leave granted, remand this matter to the Court of Appeals for the purpose of

entering a judgement declaring that the offending connection charges constitute a tax, not a user fee, and ordering that they are null and void, or, in the alternative, order an evidentiary hearing on taxpayer's allegations in this regard to be held either before the panel, a master, or referred to the Circuit Court for the County of Oscoda, Michigan.

4. In the alternative, make a final decision or peremptory order under MCR 7.302(G) (1) order an evidentiary hearing on taxpayer's allegations in this regard to be held either before the panel, a master, or referred to the Circuit Court for the County of Oscoda, Michigan.

5. In the alternative, make a final decision or peremptory order under MCR 7.302(G) (1) allowing the plaintiffs to amend their complaint, or ordering that Court of Appeals to permit plaintiffs to amend their complaint in this case, or at least to provide plaintiffs the opportunity to move the Court of Appeals for permission to amend the complaint, and to then order an evidentiary hearing on taxpayer's allegations in this regard to be held either before the panel, a master, or referred to the Circuit Court for the County of Oscoda, Michigan..

6. In the alternative, that the court, under MCR 7.316 fashion and declare such other relief as the Court considers just and equitable to resolve this controversy on the merits, including the entry of the drawing of inferences of fact and the entry of an order that out to have been entered, as the case may require.

Dated this 25th day of January, 2004.

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